



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 15, 1993

Mr. John C. Ross, Jr.
City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR93-323

Dear Mr. Ross:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19464.

The City of Lubbock (the "city") has received a request for information submitted in response to city Request for Proposals No. 12385. Specifically, the requestor seeks "copies of all of the responses to a Request for Proposal . . . regarding a Marketing Proposal for Meadowbrook Golf Course." You have submitted the requested information to us for review and claim that it is excepted from required public disclosure by sections 3(a)(4) and 3(a)(10) of the Open Records Act.

Pursuant to section 7(c) of the Open Records Act, we have notified the companies whose interests may be affected by disclosure of the information submitted to us for review. In response, we have received letters from Caviness Advertising/Public Relations, Inc. ("Caviness"), and N. Armstrong Advertising Agency ("Armstrong"). Caviness objects to release of its proposal under the Open Records Act. Armstrong however, does not object to release of its proposal. Accordingly, we need here address only whether Caviness's proposal may be withheld under the Open Records Act.¹

We turn first to section 3(a)(4). Section 3(a)(4) excepts from required public disclosure "information which, if released, would give advantage to competitors or bidders." The purpose of section 3(a)(4) is to protect governmental interests in

¹We did not receive a response from the other notified company. Because we have no basis to withhold the information under section 3(a)(10), the information concerning this company may not be withheld from required public disclosure under section 3(a)(10). See, e.g., Open Records Decision Nos. 405, 402 (1983). In addition, we presume that the requestor's proposal will be made available to him to the extent that it is encompassed by his request.

commercial transactions. Open Records Decision No. 541 (1990). Section 3(a)(4) is no longer applicable when the bidding on a contract has been completed and the contract is in effect. *Id.* The city advises us that a contract in this instance has been awarded and that the competitive bidding process has thus been concluded. Neither the city nor Caviness indicates how the requested information relates to any other commercial transaction to which the city is party. Accordingly, we conclude that section 3(a)(4) does not except from required public disclosure the information at issue here.

We turn next to section 3(a)(10). Section 3(a)(10) protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted under section 3(a)(10) only if it is privileged or confidential under the common or statutory law of Texas. Open Records Decision No. 592 (1991) at 9.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939).

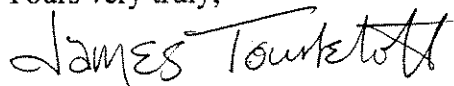
This office has previously held that if a governmental body takes no position with regard to the application of the "trade secrets" branch of section 3(a)(10) to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is

submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6.²

Caviness states that it "is strongly opposed to allowing [the requestor] access to our Marketing Proposal for Meadowbrook Golf Course." The respondent, however, does not claim that its proposal contains trade secrets, nor does it provide any evidence supporting such a contention. We thus have no basis on which to conclude that Caviness has made a *prima facie* case establishing that its proposal contains trade secrets. Moreover, neither the city nor the respondent has demonstrated that the requested information contains commercial or financial information that is privileged or confidential under the common or statutory law of Texas. Accordingly, we conclude that the requested information may not be withheld under section 3(a)(10) of the Open Records Act and must be released in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



James E. Tourtelott
Assistant Attorney General
Opinion Committee

JET/GCK/jmn

Ref.: ID# 19464
ID# 19602
ID# 19918

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

cc: Mr. David E. Knapp
Knapp Communications
1206 Avenue R, Suite D
Lubbock, Texas 79401

Mr. Jason Bergeron
Caviness Advertising & Public Relations, Inc.
8200-A Nashville, Suite 200
Lubbock, Texas 79423

Ms. Nelda Armstrong
Owner
Armstrong Advertising
8200-C Nashville, Suite 103A
Lubbock, Texas 79423

Mr. Ron Thomas
R.D. Thomas Advertising
4601 South Loop 289
Lubbock, Texas 79412